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No. 75-1378

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM COSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
FREDERICK EISENBUD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 529 F.2d 143.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1976. A petition for rehearing *en banc* was considered as a petition for rehearing and denied on February 27, 1976 (Pet. App. A-13). The petition for a writ of certiorari was filed on March 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court committed prejudicial error by refusing to ask prospective jurors four proposed questions.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 12 years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed.

The evidence (see Pet. App. A-4) showed that in the winter of 1975, while petitioner was selling heroin in St. Louis, Benny Green, a St. Louis Police Department detective, twice arranged to purchase heroin from petitioner through Phelbert Angle.[1] Angle, unaware that Green was a law enforcement officer, paid for the heroin on both occasions with money furnished by Green and turned the drug over to Green.

The trial judge conducted the *voir dire* of the jury panel. The court first read the pertinent counts of the indictment to the jury panel and instructed the panel that the indictment was not evidence of guilt (Tr. 5). The judge instructed the panel that the burden of proof was on the government to establish guilt beyond a reasonable doubt (Tr. 5) and inquired whether any of the veniremen would give special weight to the testimony of police officers (Tr. 22).

Defense counsel submitted seven questions to the court. Petitioner now contends that it was error not to ask four of the submitted questions,[2] each of which related

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[1]Angle and Danny Mayer, another customer of petitioner's who was involved in the second purchase of heroin, each pleaded guilty to one count of the indictment.

[2]The four questions are (Tr. 25-26):

1. Is there anyone on the panel who argues with the proposition that the Government must prove the defendant guilty beyond a reasonable doubt?

to the burden of proof or the presumption of innocence. The court declined to ask the questions. It promised, however, to instruct the jury concerning these matters and stated that it assumed the jury would follow the instructions (Tr. 25). The court then inquired whether anyone could not give the defendant a fair trial (Tr. 26); whether each juror would follow the trial court's instructions "as to what the law is as to the presumption of innocence, the burden of proof or any other instruction I give you in this cause" (Tr. 27); and whether there was any reason why a member of the panel would not give both sides "an absolutely fair and impartial hearing if they're chosen to serve" (Tr. 28).

After the jury was selected and sworn, and before opening statements were made, the court instructed the jurors that the law applicable to the case would be contained in the instructions given by the court during the course of the trial and that it was the jurors' "duty to follow all such instructions" (Tr. 30). During the court's final instructions to the jury (Pet. App. A-10),

> [the jury] was fully, fairly and correctly instructed about presumption of innocence, burden of proof, and reasonable doubt, and the court specifically told the jury that the law never imposes upon a defendant in

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2. Is there anyone on the panel who argues with the proposition that the Government has the burden of proof?

3. Is there anyone on the panel who argues with the proposition that the defendant is presumed innocent unless and until the Government meets its burden of proving guilt beyond a reasonable doubt, if the Government ever does?

4. Is there anyone on the panel who does not look at the defendant and presume him to be innocent as he sits before you?

a criminal case the burden of calling or duty to call witnesses or produce witnesses in his behalf. [See Supp. Tr. 1-3, 8.]

ARGUMENT

The court of appeals correctly concluded (Pet. App. A-11) that the trial court had not abused its discretion by declining to ask prospective jurors the questions proposed by petitioner. District courts have broad discretion to determine the questions on *voir dire*. Fed. R. Crim. P. 24(a); *Ristaino* v. *Ross*, No. 74-1216, decided March 3, 1976, slip op. 6; *Hamling* v. *United States*, 418 U.S. 87, 139; *Ham* v. *South Carolina*, 409 U.S. 524, 528. As the court below stated (Pet. App. A-11):

> [T]he district court did not abuse its discretion when it refused to ask the members of the panel whether they "argued" with the legal principles that have been mentioned. The jurors were obligated by their oath to accept the law as given them by the court and to return a verdict in accordance with the law and the evidence, and the presumption is that the jurors did their duty.

The district court fully instructed the jury at the close of the evidence concerning the presumption of innocence, burden of proof, and reasonable doubt. Moreover, each of the jurors had been asked when they were impanelled whether they could abide by such instructions, and none said that he could not. The combination of questions on *voir dire* and instructions to the jury minimized any possibility of prejudice to petitioner. The courts of appeals routinely uphold procedures similar to those used here. *United States* v. *Wooten*, 518 F.2d 943, 945-947 (C.A. 3), certiorari denied, 423 U.S. 895; *United States* v. *Cockerham*, 476 F.2d 542, 544 (C.A.D.C.); *United States* v. *Crawford*, 444 F.2d 1404, 1405 (C.A. 10), certiorari

denied, 404 U.S. 855; *United States* v. *Gillette*, 383 F.2d 843, 849 (C.A. 2); *Stone* v. *United States*, 324 F.2d 804, 805-807 (C.A. 5), certiorari denied, 376 U.S. 938; *Gorin* v. *United States*, 313 F.2d 641, 647 (C.A. 1), certiorari denied, 379 U.S. 971.[3]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[3]The contrary view expressed by the majority of the panel in *United States* v. *Blount*, 479 F.2d 650, 651 (C.A. 6), on which petitioner relies (Pet. 7), was explicitly rejected by the Third Circuit in *United States* v. *Wooten*, *supra*, 518 F.2d at 947, n. 7, a case in which the Court denied certiorari earlier this Term. *Wooten* correctly held that *Blount* failed to consider important policies, such as the need for reasonable expedition on *voir dire*. Since the decision below accords with the clear consensus among the circuits that have considered the necessity of asking prospective jurors questions such as those at issue here (a consensus, we submit, that represents a proper balancing of the conflicting interests involved in such circumstances), there is no reason for this Court to grant the petition. In light of the discretion traditionally accorded district courts on *voir dire*, this is not the sort of question requiring consistency among the circuits, in the absence of any reason to believe that the Sixth Circuit's rule is a substantial impediment to the administration of justice.

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